

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 1998

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEST 97-96-DM |
| on behalf of CLAY BAIER | : | |
| Complainant | : | J & J Pit |
| | : | |
| v. | : | Mine I.D. 05-04517 |
| | : | |
| DURANGO GRAVEL, | : | |
| Respondent | : | |

SUPPLEMENTAL DECISION AND FINAL ORDER

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U. S. Department of Labor,
Denver, Colorado, for Complainant;
Jim Helmericks, owner, Durango Gravel, Durango, Colorado,
for Respondent.

Before: Judge Manning

This proceeding was brought by the Secretary of Labor on behalf of Clay Baier against Durango Gravel under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c) (the Mine Act). In a decision entered on January 27, 1998, I found that Mr. Baier's discharge from his employment violated section 105(c) of the Mine Act. 20 FMSHRC 59. Counsel for the Secretary filed a brief setting forth the amount of back pay she contends that Mr. Baier is entitled to, the calculations she used to arrive at the back pay amount, and the civil penalty that she contends should be assessed under the penalty criteria of section 110(i) of the Mine Act. Durango Gravel filed a response.

I. MOTION FOR RECONSIDERATION

On February 3, 1998, Durango Gravel filed a motion asking that I reconsider my decision granting the complaint of discrimination. The Secretary opposes this motion. Durango Gravel states that I made a number of errors. First, it argues that I incorrectly determined that Jim Helmericks, the owner of Durango Gravel, was hostile towards MSHA and Mr. Baier's

conversations with MSHA Inspector Williams. 20 FMSHRC at 66. Mr. Helmericks contends that he never exchanged harsh words with MSHA. The record shows that Mr. Helmericks believes that Williams should not have discussed safety issues with Baier and that Helmericks considered such conversations to be a threat to his ability to manage the pit. I recognize that Durango Gravel was not so hostile towards MSHA that it did not cooperate during inspections. Nevertheless, it was hostile when employees attempted to discuss safety issues with MSHA.

Second, Mr. Helmericks maintains that he never ordered or required Baier to dig from the toe of the highwall. Mr. Helmericks proceeded without counsel in this case. On a number of occasions I attempted to advise Mr. Helmericks about the legal issues in this case and how he should attempt to establish that Durango Gravel did not discriminate against Mr. Baier. 20 FMSHRC at 69. The hearing lasted about a day and a half and Mr. Helmericks chose to devote most of his resources attempting to establish that the Secretary's witnesses were not credible. In the motion for reconsideration, Durango Gravel asks that I see through its crude defense and somewhat misguided approach at the hearing and find that Mr. Baier was not a credible witness. (Motion at 5). I am required to base my decision on the evidence presented at the hearing. I cannot make findings based on what I think really happened unless these findings are supported by evidence presented at the hearing. Durango Gravel did not present facts to establish that the testimony of Secretary's witnesses should not be given any credibility.

In my decision, I found that Mr. Baier's termination was motivated at least in part by his protected activity. I further found that Baier also engaged in activity that was not protected under the Mine Act. I determined that Durango Gravel did not establish that it would have terminated Mr. Baier for his unprotected activity alone. Mr. Helmericks was given the opportunity to present evidence on this issue at the hearing. The motion for reconsideration does not set forth sound reasons to alter my findings and conclusions set forth in the decision of January 27. For the reasons set forth above, the motion for reconsideration is **DENIED**.

II. BACK WAGES

Mr. Baier did not ask for reinstatement, but seeks back wages for a period of three weeks and three days. Part of this back pay is for one week and three days between July 21 and July 31, 1996, when he worked for Durango Gravel but was not paid. The second part is for the two weeks following his August 1 termination when he was not employed.

Baier testified that he was paid \$11 per hour at the time of his discharge and that he worked an average of 50 hours a week. (Tr. 11, 13, 69). The Secretary contends that he should be awarded \$825 for the period prior to his termination. The Secretary contends that he should be awarded \$1,100 for the two-week period he was out of work.

Durango Gravel presented Baier's time cards for the period between July 21 and July 31. The time cards show that Baier worked 51 hours the first week and that his gross pay was \$622. The hourly rate is shown as \$16.50 for those hours above 40 hours a week. The time cards show

that he worked 25 hours the partial week and his gross pay would have been \$275.00. The total would be \$897. Durango Gravel contends that Mr. Baier caused more than \$3,000 damage to its equipment while he worked at the pit and it seeks to withhold any pay for this period as partial payment for this damage.

Durango Gravel also contends that Mr. Baier was unemployed for only one week following his termination at the pit. It attached to its brief a payroll statement from K2 Enterprises showing that Baier worked there on August 8 and 9, 1996. Durango Gravel also maintains that Baier worked an average of 40 hours a week during the summer of 1996. It attached time cards to its brief in support.

As I previously held, Durango Gravel is not entitled to deduct from the back-pay award the amount of any damage Baier caused to equipment. 20 FMSHRC at 71-72. The evidence shows that Baier damaged a loader about ten days prior to his termination. It is clear that the damage was accidental. There was conflicting testimony as to whether Mr. Helmericks was concerned about this accident at the time. 20 FMSHRC at 69-70. Mr. Helmericks did not tell Baier that he would deduct the cost of repairing the damage from his wages. The damaged loader was not repaired until about a week before the hearing in this case. (Tr. 309). I find that there is insufficient evidence that Durango Gravel would have required Baier to pay for the damage if he had not been terminated. I could find no Commission cases in which an administrative law judge deducted accidental damage to equipment from a back-pay award.

Based on the payroll records provided by Durango Gravel, I find that Baier is entitled to \$897 in back pay for the period July 21 through July 31, 1996. With respect to the period after Baier's termination, the record contains little information. His starting date at K2 Enterprises was not established by the Secretary. (See, for example, Sec. Response to Interrogatories at 2). All time frames were rough estimates and Mr. Baier's estimates of time and dates at the hearing were quite vague and unreliable. I credit Durango Gravel's evidence that Baier worked about 40 hours per week, on average. I also credit its evidence that Baier was not unemployed for a full two-week period following his discharge. I hold that Baier is entitled to 50 hours of back pay for the period after his discharge, which is \$550. Accordingly, the total back-pay award is \$1,447.

The Commission has held that a miner is entitled to interest on a back-pay award. *Arkansas-Carbona Co.*, 5 FMSHRC 2040, 2051-53 (December 1983); *modified by Clinchfield Coal Co.* 10 FMSHRC 1493, 1504-06 (November 1988). The Commission uses the short-term Federal rate applicable to the underpayment of taxes. 10 FMSHRC at 1505. The Commission uses the following formula to calculate interest: Amount of interest = The calendar quarter's net back pay x number of accrued days of interest from the last day of that quarter to the date of payment x the daily short-term rate interest factor. 5 FMSHRC at 2052. The relevant short-term rate is 9 percent and the daily short-term rate interest factor is .00025. Using this formula, the amount of interest owed through March 6, 1998, is \$187. Thus, the total award is \$1,634, provided that the amount owed is paid within 40 days of the date of this decision.

III. CIVIL PENALTY

The Secretary proposes a civil penalty of \$2,500. Section 110(i) of the Mine Act provides that in assessing a civil penalty the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The record shows that other employees had complained about unsafe practices at the mine and that a formal complaint was filed in 1996 under section 103(g) of the Mine Act. Durango Gravel does not have any previous history of violations of section 105(c) of the Mine Act. MSHA Inspector Royal Williams testified that the J&J Pit had been issued more citations than is typical for a mine of its size in the area. (Tr. 230). Based on this evidence, I find that Durango Gravel's history of previous violations is moderate to high.

Durango Gravel is a sole proprietorship owned by James Helmericks. The J&J Pit consists of a pit and a small crusher. The crusher is old and, according to Mr. Baier, it could only operate about eight hours per week. It broke down on a regular basis. Durango Gravel employed only two individuals at any given time. One of these employees was often Mr. Helmericks' son. Production was very low and the operation was not very profitable. I find that Durango Gravel is a very small operator.

The Secretary contends that Durango Gravel was highly negligent. I disagree. The evidence shows that Mr. Helmericks was concerned that Baier was operating the loader on the top of the highwall without his authorization. Although I concluded that Durango Gravel discriminated against Clay Baier, I found the case to be close. Baier did not have a protected right to operate equipment without the permission of Mr. Helmericks. I held for Mr. Baier because Durango Gravel did not establish that it would have terminated Mr. Baier for his unprotected activities alone. 20 FMSHRC at 69-71. It was this unprotected activity that was particularly troubling to Mr. Helmericks. Accordingly, I find that Durango Gravel's negligence was moderate to low.

I find that the proposed penalty would have a deleterious effect on Durango Gravel's ability to continue in business. As stated above, Durango Gravel is a very small family-run business. The description of Durango Gravel's operations offered by both Helmericks and Baier indicate that it is not a very profitable operation. The crusher is down for repair most of the time and the amount of throughput is quite low. Mr. Helmericks testified that the company is running on fumes and that it has not been operating much since late 1996. (Tr. 305). In its brief, Durango Gravel alleges that it will be faced with bankruptcy if the proposed penalty is assessed. (DG Br. at 4). The record does not establish that bankruptcy is imminent, but it does show that the operation is marginal at the current level of capitalization and that a penalty of \$2,500 would seriously affect its ability to continue in business.

I find that the violation in this case is serious. Operating a loader under a highwall is reasonably likely to cause death or serious injury to the loader operator assuming continued mining operations.

Whether Durango Gravel demonstrated good faith in attempting rapid compliance after notification of a violation in this case is difficult to analyze. Nothing in the record indicates that Durango Gravel's contest of the complaint of discrimination was frivolous or was filed in bad faith. It honestly believed that it terminated Mr. Baier for reasons that were not protected by the Mine Act. Much of the misunderstanding between Baier and Helmericks was caused by a failure of communication. On the other hand, Durango Gravel had been notified by MSHA that employees were not to dig into highwalls at the mine. As I stated in my decision, this practice did not stop. After reviewing the record and the arguments of the parties, I conclude that it has not been established that Durango Gravel failed to demonstrate good faith in this case.

Taking into consideration all of the penalty criteria, I conclude that a penalty of \$100 is appropriate in this case. In reducing the penalty, I rely primarily on the fact that Durango Gravel is a very small operator and that the proposed penalty would have a serious effect on its ability to continue in business. The operator's small size was especially important in my analysis.

IV. ORDER

A. Durango Gravel is **ORDERED TO PAY** Clay Baier the sum of \$1,634 within 40 days of the date of this decision. This payment shall be subject to normal withholding as authorized by law.

B. Durango Gravel is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of \$100 for its violation of section 105(c) within 40 days of the date of this decision.

C. My decision of January 27, 1998, and this supplemental decision and order shall constitute my final disposition of this proceeding.

Richard W. Manning
Administrative Law Judge

Distribution:

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